

seconds. Rather, the claims specifically use functional language to recite that the wafer must be sufficiently flexible. As is clearly understood by those of ordinary skill in the art, particularly with reference to the specification at page 3, lines 17-19, conventional sugar wafers remain sufficiently flexible only for a limited time after being cooked. This is the problem that the present invention surprisingly and unexpectedly solves, by permitting the wafers to be sufficiently flexible for more than 40 seconds to about 100 seconds (Specification at page 5, lines 12-15 and page 6, lines 33-35), which is not suggested by any of the cited prior art of record--even in combination. Although the present invention extends the processing window by lengthening the time of flexibility, the wafers are only sufficiently flexible for a limited time period determined by the recited formulation. To expedite the prosecution of this application, however, Applicants have amended claim 1 to recite a specific range of more than 40 seconds to about 100 seconds. These rejections under 35 U.S.C. § 112, first and second paragraphs, are believed to be moot for the above reasons.

Claims 1-8 are rejected under 35 U.S.C. § 112, first paragraph, as not being enabled for the recitation that the grits are "uncooked." The fact that the grits are uncooked is inherently disclosed in the application as a whole. It is clearly understood by those of ordinary skill in the art that, when referring to components of a composition to be baked, they are uncooked unless explicitly disclosed to be otherwise. Furthermore, claim 1 clearly recites a sugar wafer batter, and it is clearly understood that components in a batter are uncooked unless something to the contrary is noted. Components in a batter are inherently understood to be combined to form the batter before being cooked. Nowhere does the application refer to the wheat flour, grain component, reducing sugar, or sugar additive of the sugar wafer batter composition as being cooked before they are combined in the sugar wafer batter and then the batter is baked. No rejection has been imposed--or could properly be imposed--with respect to those ingredients, because it is clearly understood that they are also uncooked when in the "batter." If the Patent Office believes that removal of this language is still necessary even in view of these facts, Applicants can amend claim 1 to remove the unnecessary language "uncooked" as it refers to grits, since the "uncooked" term is somewhat duplicative or redundant in view of the claimed batter. Applicants had added the language to help the Patent Office understand the claimed invention, which is a batter with uncooked ingredients that is completely different from the cited art, individually or in any combination, that discloses adding cooked grits to moist dough products. Thus, Applicants respectfully believe that the rejection under 35 U.S.C. § 112, first paragraph, be reconsidered and withdrawn. Also, if the Patent Office concurs that this application is otherwise allowable but still has

concerns with the language "uncooked" as it refers to grits, Applicants hereby authorize the Examiner to make an Examiner's Amendment to remove the term "uncooked."

Claims 1-20 were rejected under 35 U.S.C. § 103(a) as being obvious over U.S. Patent No. 5,709,898 to Biggs et al. ("Biggs") in view of *The Wholefood Catalog*, Ballantine Books (1988), p. 12 ("Wholefood Catalog") and "Fresh Ways with Pastries & Sweets" ("Fresh Ways") for the reasons recited on pages 3-4 of the Office Action. Applicants respectfully traverse the rejection.

Biggs teaches a pre-formed food core around which a sugar wafer including flour and invert sugar is formed by heating a portion of the wafer. Biggs fails to teach the following features presently recited: (a) wheat flour, alone or in combination with cereal grits; (b) water; and (c) sufficient flexibility under ambient conditions for more than 40 seconds to about 100 seconds after baking, each of which is presently recited. While Biggs teaches flour generically, there is absolutely no recognition that a particular type of flour combined with either grits or reducing sugar, as presently recited, can provide the surprising and unexpected processing results obtained by the claimed invention, much less what type of flour that might be. Biggs also specifically teaches a wafer recipe in Example 1 that has *zero* water content and has no other teaching with respect to water content. Biggs also does not teach sufficient flexibility under ambient conditions after baking, as presently recited, since Biggs clearly requires localized heating of the wafer to well above ambient conditions, such as by contact of the wafer with a hot plate (Biggs Example 1), to attain sufficient flexibility to permit shaping around its pre-formed food core. Indeed, although the Office Action overlooks Biggs' failure to teach the wheat flour and water presently recited, it does acknowledge various deficiencies in Biggs' completely different teachings, including failure to teach grits, the ratio of wheat flour to grits, the amount of water, "the amount of ingredients claimed," and the water activity of the second confectionery material.

The Wholefood Catalog fails to remedy any of these deficiencies present in Biggs. The Office Action relies on Wholefood Catalog solely for the teaching that one can add a small amount of cooked grits to batters for muffins, griddle cakes, or quick breads, for extra moisture and flavor. Initially, it should be mentioned that even the combination of Biggs and The Wholefood Catalog fails to disclose or suggest (a) wheat flour and (c) sufficient flexibility, as well as the ratio of wheat flour to grits, as well as the amount of water and other ingredients presently recited. Also, the Wholefood Catalog teaches the use of *cooked* grits, while claim 1 of the present invention recites a batter including uncooked cereal grits in an amount sufficient to be baked. Thus, the Wholefood Catalog fails to teach the use

of *uncooked* grits, *i.e.*, grits in a sugar wafer batter to obtain the surprising and unexpected benefits of a sugar wafer batter and product that can be processed for a longer period of time, thereby reducing energy consumption and the need for more expensive high speed processing equipment. Moreover, the Wholefood Catalog does not even teach a batter, as recited by claim 1, since Wholefood Catalog discloses dough-based products, which are different from batters (Specification at page 1, lines 23-27). In view of this, one of ordinary skill in the art would not have been motivated to combine ingredients used in a dough-based product with those of a batter material or product. For these reasons, a *prima facie* case of obviousness has not been stated and the obviousness rejection should be withdrawn for these reasons.

The Office Action now also relies on Fresh Ways, which shows recipes for "snaps which are the same as wafers [sic]." Applicants traverse, as this is completely incorrect. Clearly, if snaps were identical to the claimed sugar wafers, the Office Action would have stated that Fresh Ways anticipates the claimed invention--however, this is clearly not the case and is a blatant attempt at hindsight reconstruction using a combination of two (2) other references in an obviousness rejection. Fresh Ways is also stated to disclose that after the snaps are baked, they stand for up to one minute to firm up slightly before being shaped into cornets or cylinders.

Those of ordinary skill in the art clearly understand that there are a variety of baked and bakable products in the art, and that each differs significantly with respect to the type and amount of various components, as well as the sometimes unpredictable processing conditions most beneficial to providing a baked product, *i.e.*, one of ordinary skill in the art would not think that a snap, or batter therefor, is equivalent to a claimed sugar wafer, or batter therefor. Indeed, the actual components of the snaps disclosed by Fresh Ways include: flour, butter, sugar, corn syrup, lemon juice, and ground ginger. The claimed sugar wafer batter of claim 1 recites significantly different ingredients, and only the ordinary sugar is disclosed by Fresh Ways. Fresh Ways does disclose flour, but does not disclose wheat flour used in the claimed batter with reducing sugar and/or grits to provide sufficient flexibility under ambient conditions for an increased processing window, as presently recited. Although the Office Action alleges that the snaps are identical to the claimed sugar wafers, Fresh Ways also fails to teach cereal grits in an amount sufficient to be baked into a crisp wafer, a reducing sugar, and water, as well as the amounts presently recited.

Moreover, no motivation existed for one of ordinary skill in the art to combine the three cited references. Biggs is directed to sugar wafers, while Wholefood Catalog is directed to cooked grits, and Fresh Ways is directed to yet a third different product--snaps.

These are completely different food products with completely different processability characteristics. The Wholefood Catalog teaching relied on by the Office Action merely discloses using cooked grits with muffins, griddle cakes, and breads, and thus would not have motivated one of ordinary skill in the art to solve the long-felt need in the art to improve sugar wafer processing problems. Those products are also significantly different from sugar wafers, in part since they have much higher water contents than sugar wafers, different textures, and they are flexible, dough-based products rather than crispy like sugar wafers. Further, the Wholefood Catalog only teaches the combination of cooked grits with those products for the purpose of extra moisture and flavor, and none of the three cited references provides motivation to combine grits with even dough-products for the purpose of increased flexibility after baking, much less motivating the combination of cooked grits with other components to form a sugar wafer batter, as presently recited. Moreover, the Wholefood Catalog also fails to teach the ratio of wheat flour to grits recited by independent claim 9. The cited references also fail to teach that wheat flour coupled with reducing sugar and/or grits helps provide this surprising and unexpected flexibility to the claimed invention.

Similarly, no motivation existed for one of ordinary skill in the art to combine a Fresh Ways snap--a completely different product from a sugar wafer--with a sugar wafer to solve the processing problems of conventional sugar wafers. Rather, Biggs attempted to solve the known processing problem in a completely different manner--by providing localized heating after baking to shape the wafer, rather than providing a specific and unique wafer composition to provide the unexpected and surprising result of a wafer that does not require heating to provide this flexibility, as presently recited. Indeed, Biggs teaches away from the presently claimed invention by requiring such localized heating to permit sufficient flexibility under ambient conditions after cooking. The Wholefood Catalog's dough-products do not even mention a flexibility problem, nor do they have one due to their high water content. Fresh Way's snaps are also an entirely different food from the claimed sugar wafers, and no problem with flexibility was believed to exist with respect to that type of product.

In fact, The Wholefood Catalog inherently teaches that high water contents are needed for its dough-based products, in contrast with the wafer of Biggs that has no water present. Fresh Ways is at best simply silent on the need for water, although Applicants note that the lemon and other juices disclosed as being in the snaps are primarily water. Those of ordinary skill in the art would have found it completely unreasonable to combine Biggs and either The Wholefood Catalog or Fresh Ways, since no reason for doing so existed in the art--particularly for the purpose alleged by the Office Action. Indeed, dough-products typically

have flexibility even after baking, and no motivation existed to look to the food products of The Wholefood Catalog or Fresh Ways, which had no flexibility problem, to find a solution to the problem that existed with sugar wafer flexibility. In sum, nothing in the record or the cited art provided a motivation to combine the cited art.

Fresh Ways is simply cumulative to The Wholefood Catalog, in that it does not disclose or suggest any additional recited features with respect to the components presently claimed. Indeed, neither of the secondary references remedies the deficiencies of Biggs, the primary reference. None of the references, individually or in any combination, discloses or even suggests a sugar wafer batter having sufficient flexibility over a lengthened processing window, as presently recited. Even if such a motivation existed to somehow take the flexible processing characteristics of a snap and add those characteristics to a sugar wafer, the two have significantly different components, and no reasonable expectation of success existed in picking and choosing components and amounts thereof from these different products to arrive at the desired and claimed characteristics.

Additionally, even assuming a motivation to combine these references, or the different products disclosed therein, could be generated based on hindsight, no reasonable expectation of success in achieving the present invention existed since the cited references in combination still do not teach all the features presently recited. For example, none of the references teaches sufficient flexibility under ambient conditions for more than 40 seconds to about 100 seconds after baking to enable further wafer processing. While Fresh Ways discloses flexibility after baking, it is not a sugar wafer and therefore cannot improve wafer processing as described above. Also, all three references completely fail to disclose a grain component comprising wheat flour. While flour is taught by Biggs and Fresh Ways, and inherently by The WholeFood Catalogue, no suggestion existed in the cited references that wheat flour in particular could provide the surprising and unexpected advantages currently obtained in wafers when combined with the claimed reducing sugar and/or grits. For these additional reasons, no *prima facie* case of obviousness has been stated.

The Patent Office, which previously stated that no factual evidence existed for the fact that Biggs inherently teaches a limited processing time, now relies on the improper combination of a completely different product that happens to have a 60 second processing time after baking. The entire purpose of Biggs' invention is to overcome the well known processing problems of handling wafers after they cool under ambient conditions. Indeed, Biggs is exclusively directed to teaching the necessity of re-heating a portion of the wafer when needed to permit proper processing, *i.e.*, shaping the wafer around a pre-formed food

core. Applicant does not need to show Biggs has limited processing, because it inherently teaches that fact--otherwise there would be no need for its invention of subsequent localized heating for processing. The independent claims all recite that "after baking" means under ambient conditions, which clearly distinguishes from Biggs' reheating. Also, even though Biggs teaches an amount of invert sugar as recited in one of the claimed embodiments, as noted above, Biggs still fails to teach wheat flour, water, grits, and sufficient flexibility after baking, each of which is presently recited but not remedied by any cited reference. Also, this embodiment functionally requires larger amounts of invert sugar than the 15.7% that Biggs teaches, which is claimed by virtue of the "sufficiently flexible" language. As a result, Biggs does not obtain the properties presently claimed since it does not teach several of the claimed features. It is completely improper to rely on Fresh Ways simply because it has the "missing" feature of processing time after baking a sugar wafer that Biggs fails to teach. Biggs has a solution to the sugar wafer processing problem, however, even the combination of references fails to teach or even motivate one of ordinary skill in the art as to how the benefits of good processing time in a snap product could be used to improve Biggs' solution of post-baking heating of sugar wafers to permit sugar wafer flexibility. Even then, nothing in Fresh Ways teaches one of ordinary skill in the art what components or aspects of its formulation actually provide an increased processing window. Under these circumstances, such a hindsight rejection must fail--in particular because nothing in any of the cited references provides motivation to combine features of a snap with a sugar wafer.

The previous Office Action mistakenly indicated that "[i]t is not necessary to show an ingredient is added for the same purpose as the claimed product." This is true where all ingredients are present in a single reference, and the same composition is actually disclosed. But this statement is not correct with respect to the present situation, *i.e.*, an obviousness rejection, where even the current Office Action maintains a rejection based on multiple references to combine "ingredients" used for completely unrelated purposes without any teaching or motivation in the references to do so. In the obviousness context, a motivation must have existed for one of ordinary skill in the art to combine the references--and the lack of such a motivation demonstrates the patentability of the claims over the cited references, or at the very least demonstrates the lack of a *prima facie* case of obviousness by the Patent Office.

Various additional claims recite patentably distinct features, even in view of the combined teachings of the cited references. Claim 7 recites that sufficient flexibility is retained in the recited sugar wafer for more than 50 seconds, which is also clearly not taught

by the cited art. Claim 11 recites that 20 to 80 weight percent of the sucrose is replaced with a reducing sugar component, while Biggs at best teaches 24.2% sucrose and 4.5% invert sugar, a reducing sugar component, such that only  $4.5 / (24.2 + 4.5) = 15.7\%$  of the sucrose is replaced by invert sugar. The cited references fail to teach the feature of claim 11. Biggs provided no motivation to "optimize" this amount of invert sugar higher, since it provides no teaching that sugar wafer flexibility can be increased through any means other than localized heating after baking, and even the combination of references does not provide any teaching for increasing sugar wafer flexibility. Indeed, independent claim 13, which recites reducing sugar, also recites this feature of replacing a sufficient amount of sugar with a reducing sugar. Biggs, even if improperly combined (*i.e.*, since the art lacks proper motivation to combine) with the other cited art of record, completely fails to disclose or suggest the features of independent claim 13. Claims 15-17 recite a confectionery material having a water activity below 0.5 and in direct contact with the sugar wafer, which surprisingly and unexpectedly minimizes or avoids problems of water migration into the sugar wafer (*See, e.g.*, Specification at page 5, lines 23-26). The current Office Action even concedes that Biggs fails to disclose these features, and nothing in the Office Action points to any teaching in any of the references as to the water activity of the claimed confectionery material. In fact, Biggs fails to even suggest such a feature. Instead, Biggs discloses use of a moisture barrier between any food core and the wafer to avoid the water migration problem, which *teaches away* from using low water activity confectionery materials in direct contact with the wafer, as presently recited. Thus, these dependent claims are separately patentable for these additional reasons. For these reasons, Applicants respectfully request that the rejection of claims 1-20 under 35 U.S.C. § 103(a) be reconsidered and withdrawn, since a *prima facie* case of obviousness has not been stated on the record.

Applicants now believe all claims to be in condition for allowance. Should the Examiner not agree with this position, a telephone or personal interview is requested to resolve any remaining issues.

A Petition for Extension of Time, with provision for the required fee, is submitted herewith.

No fee is believed to be due for this response. Should any fees be required, however, please charge them to Winston & Strawn deposit account no. 501-814.

Respectfully submitted,

9/30/02  
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**APPENDIX A: MARKED UP VERSION OF THE AMENDED CLAIMS**

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1. (Three Times Amended) A sugar wafer batter comprising:

(i) a grain component comprising wheat flour and uncooked cereal grits in an amount sufficient to be baked into a crisp wafer; a sugar additive comprising sucrose, a reducing sugar, or a mixture thereof in an amount sufficient to provide a sweet taste to the wafer; and water in an amount sufficient to form a batter; or

(ii) a grain component comprising wheat flour in an amount sufficient to be baked into a crisp wafer; a sugar additive comprising sucrose and a reducing sugar in an amount sufficient to provide a sweet taste to the wafer; and water in an amount sufficient to form a batter;

wherein a sugar wafer obtained by baking batter (i) or (ii) is sufficiently flexible under ambient conditions for more than 40 seconds to about 100 seconds after baking to enable further processing of the wafer.

9. (Three Times Amended) A baked sugar wafer comprising fat, wheat flour, cereal grits, sucrose, and water, wherein the combination of fat, wheat flour, cereal grits, sucrose, and water account for at least 95 percent by weight of the sugar wafer; the amount of water in the sugar wafer is from about 0.5% to 6% by weight based on the weight of the sugar wafer; the sucrose is present in an amount of from 50 to 100 parts by weight per 100 parts by weight of the wheat flour and cereal grits; and the ratio of wheat flour to cereal grits to is from 10:90 to 80:20; and whereby the sugar wafer is sufficiently flexible under ambient conditions for more than 40 seconds to about 100 seconds after baking to enable further processing of the wafer.

13. (Three Times Amended) A baked sugar wafer comprising fat, wheat flour, sucrose, a reducing sugar, and water, wherein the combination of fat, wheat flour, sucrose, a reducing sugar, and water account for at least 95 percent by weight of the sugar wafer; the amount of water in the sugar wafer is from about 0.5% to 6% by weight based on the weight of the sugar wafer; the sucrose and reducing sugar are present in an amount of from 50 to 100 parts by weight per 100 parts by weight of the wheat flour; and the ratio of sucrose to reducing sugar is from 80:20 [85:15] to 20:80; and whereby the sugar wafer is sufficiently flexible under ambient conditions for more than 40 seconds to about 100 seconds after baking to enable further processing of the wafer.

## **APPENDIX B: PENDING CLAIMS**

1. (Three Times Amended) A sugar wafer batter comprising:

(i) a grain component comprising wheat flour and uncooked cereal grits in an amount sufficient to be baked into a crisp wafer; a sugar additive comprising sucrose, a reducing sugar, or a mixture thereof in an amount sufficient to provide a sweet taste to the wafer; and water in an amount sufficient to form a batter; or

(ii) a grain component comprising wheat flour in an amount sufficient to be baked into a crisp wafer; a sugar additive comprising sucrose and a reducing sugar in an amount sufficient to provide a sweet taste to the wafer; and water in an amount sufficient to form a batter;

wherein a sugar wafer obtained by baking batter (i) or (ii) is sufficiently flexible under ambient conditions for more than 40 seconds to about 100 seconds after baking to enable further processing of the wafer.

2. The sugar wafer batter of claim 1, wherein the grain component contains cereal grits and the ratio of wheat flour to cereal grits is from 10:90 to 80:20.

3. The sugar wafer batter of claim 2, wherein cereal grits are corn grits, maize grits, wheat grits, oat grits, rice grits, or a combination thereof.

4. The sugar wafer batter of claim 1, wherein the water is present in an amount of from 100 to 160 parts by weight per 100 parts by weight of the grain component.

5. The sugar wafer batter of claim 1, wherein the sugar additive is present in an amount of from 50 to 100 parts by weight per 100 parts by weight of the grain component.

6. The sugar wafer batter of claim 1, wherein the sugar additive contains a reducing sugar and the reducing sugar is fructose, glucose, glucose syrup, dextrose, corn syrup, invert sugar, a fruit juice containing a reducing sugars, honey, or a mixture thereof.

7. (Amended) The sugar wafer batter of claim 1, wherein the sugar wafer is sufficiently flexible for more than 50 seconds after baking to enable further processing.